In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-617

GOLAY & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In its initial unfair labor practice proceeding, the Board found that the Company committed various unfair labor practices, including discharging or refusing reinstatement to 42 employees who had engaged in a strike protesting the Company's conduct in opposing the organizational campaign of the United Automobile Workers at its plant during the latter part of 1962. The Board rejected the Company's defense that the striking employees had engaged in misconduct justifying the Company's refusal to rein-

state them.[1] The Board concluded, *inter alia*, that, assuming that the strikers' misconduct removed their strike activity from the protection of Section 7 of the Act, the misconduct "was not of such serious nature in the total circumstances of this case as to warrant denial of their reinstatement" when measured against the Company's "massive unfair labor practices." 156 NLRB at 1263, n. 13.[2] The Board ordered the Company, *inter alia*, to reinstate the strikers with backpay from the date of their unconditional offer to return to work. *Id.*, at 1265. The court of appeals enforced the Board's order in full. 371 F. 2d 259 (C.A. 7), certiorari denied, 387 U.S. 944.

2. In the subsequent proceeding to determine the amount of backpay due, the Company contended that backpay for the 23 strikers found not entitled to reinstatement by the Trial Examiner (n. 1, *supra*) should be tolled for the period between the decision of the Examiner and that of the Board reversing him (R. 4).[3] The Board rejected this contention (R. 4,

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[1] The Board thus reversed its Trial Examiner who had found that 23 strikers were not entitled to reinstatement because of strike misconduct. 156 NLRB at 1260-1261.

[2] The Board applied the principle, announced in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883, that, when a strike is caused by the employer's unfair labor practices, the fact that employees have engaged in misconduct during the strike does not automatically disqualify them from reinstatement and backpay; the Board, after balancing the employer's unfair labor practices against the employees' misconduct, still may properly conclude that a remedy for the employees would effectuate the policies of the Act.

[3] "R." references are to the appendix in the court below.

63) and the court of appeals affirmed, pointing out that the Board has " 'broad discretion' " in fashioning remedies and the Company raised "no 'special factors' * * * as to why it would be inequitable to burden it with the financial consequences of its unlawful practices in order to restore the status *quo ante*, see *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969)" (Pet. App. 4a-5a).

3. The only issue the petition raises is whether the Board abused its discretion to devise appropriate remedies by declining to toll backpay for the 23 strikers here. This issue, which turns on the facts of the particular case, does not warrant review by this Court. In any event, the Board was reasonable in declining to toll here.

In *Ferrell-Hicks Chevrolet, Inc.*, 160 NLRB 1692, the Board established the policy that backpay would not be tolled even where a party relied on an earlier favorable decision in refusing reinstatement. It added, however, that, where "there is no element of employer intent which so compellingly fixes the equities * * *, the Board will consider any special factors in the case which may prompt the conclusion that a full backpay award would be inappropriate." *Id.*, at 1695. In this case the Board found, and the court of appeals agreed (Pet. App. 4a-5a), that, while there was no element of employer intent, there were also no "special factors" which would militate against a full backpay award.

The decision here does not conflict with *Kohler Co.*, 148 NLRB 1434, where backpay was tolled. In *Kohler*, the Board initially did not accept the applicability

of *Thayer* (n. 2, *supra*); therefore, until the court of appeals' remand, the employer was not "fully apprised of the legal principles to be applied to its refusal to reinstate the strikers who had been discharged for misconduct." *Ferrell-Hicks*, *supra*, 160 NLRB at 1697. There is no similar equitable consideration here, "since the Examiner, Board and the court applied *Thayer* throughout this proceeding" (Pet. App. 5a).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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